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No. 90-1853

Supreme Court, U.S.
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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1990

NATIONWIDE CORPORATION AND
NATIONWIDE MUTUAL INSURANCE COMPANY,
Petitioners,

v.

HOWING COMPANY AND
DOUGLAS McLELLAN,
Respondents.

BRIEF FOR THE RESPONDENTS IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

DOUGLAS G. COLE
(Counsel of Record)
William R. Jacobs
STRAUSS & TROY
2100 Central Trust Center
201 East Fifth Street
Cincinnati, Ohio 45202-4186
(513) 621-2120
Counsel for Respondents
Howing Company and
Douglas McLellan

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QUESTIONS PRESENTED

1. Whether the Sixth Circuit was correct in its determination that in a going private transaction, governed by Section 13(e) of the Securities Exchange Act of 1934 and Rule 13e-3 promulgated thereunder, the failure of the issuer to disclose certain facts, as required by the Securities and Exchange Commission, creates a rebuttable presumption that the omitted facts are material.

2. Whether the Sixth Circuit was correct in its determination that an implied cause of action exists under Section 13(e)(1) of the Securities Exchange Act of 1934.

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Respondents Howing Company and Douglas McLellan respectfully request that the Court deny the issuance of a writ of certiorari to review the judgments and decisions of the United States Court of Appeals for the Sixth Circuit entered on March 6, 1991 and August 7, 1987.

JURISDICTION TO REVIEW IN THIS COURT

Petitioners allege that jurisdiction of the Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY AND REGULATORY PROVISIONS INVOLVED

1. Section 13(e)(1) of the Securities Exchange Act of 1934, 15 U.S.C. § 78m(e)(1) (1988), provides:

> It shall be unlawful for an issuer which has a class of equity securities registered pursuant to section 12 of this Act, or which is a closed-end investment company registered under the Investment Company Act of 1940, to purchase any equity security issued by it if such purchase is in contravention of such rules and regulations as the Commission, in the public interest or for the protection of investors, may adopt
>
> (A) to define acts and practices which are fraudulent, deceptive, or manipulative, and
> (B) to prescribe means reasonably designed to prevent such acts and practices.
>
> Such rules and regulations may require such issuer to provide holders of equity securities of such class with such information relating to the reasons for such purchase, the source of funds, the number of shares to be purchased, the price to be paid for such securities, the method of purchase, and such additional information, as the Commission deems necessary or appropriate in the public interest or for the protection of investors, or which the Commission deems to be material to a determination whether such security should be sold.

2. Rule 13e-3(b) under the Securities Exchange Act of 1934, 17 C.F.R. § 240.13e-3 (1990) provides:

> (1) It shall be a fraudulent, deceptive or manipulative act or practice, in connection with a Rule 13e-3 transaction, for an issuer which has a class of equity securities registered pursuant to section 12 of the Act or which is a closed-end investment company

registered under the Investment Company Act of 1940, or an affiliate of such issuer, directly or indirectly.

(i) To employ any device, scheme or artifice to defraud any person;

(ii) To make any untrue statement of a material fact or to omit to state a material fact necessary in order to make the statements made, in light of the circumstances under which they were made, not misleading; or

(iii) To engage in any act, practice or course of business which operates or would operate as a fraud or deceit upon any person.

(2) As a means reasonably designed to prevent fraudulent, deceptive or manipulative acts or practices in connection with any Rule 13e-3 transaction, it shall be unlawful for an issuer which has a class of equity securities registered pursuant to section 12 of the Act, or an affiliate of such issuer, to engage, directly or indirectly, in a Rule 13e-3 transaction unless:

(i) Such issuer or affilate complies with the requirements of paragraphs (d), (e) and (f) of this section; and

(ii) The Rule 13e-3 transaction is not in violation of paragraph (b)(1) of this section.

DECISIONS OF THE SIXTH CIRCUIT FROM WHICH PETITIONERS APPLY FOR A WRIT OF CERTIORARI

There are two decisions of the United States Court of Appeals for the Sixth Circuit from which Petitioners apply for a Writ of Certiorari. The most recent decision was entered on March 6, 1991. In this decision the Sixth Circuit established a presumption of materiality in a going private transaction, governed by § 13(e) of the Securities and Exchange Act of 1934 (the "Exchange Act") and Rule 13e-3 promulgated thereunder which mandates the stringent disclosure obligations of an issuer in such a transaction.

Petitioners also make a second attempt to obtain the issuance of a Writ of Certiorari for this Court to review the decision of the Sixth Circuit entered in this case on August 7, 1987 (826 F.2d 1470 (6th Cir. 1987)). Petitioners' initial application to review the judgment and decision of the Sixth Circuit entered on August 7, 1987 was denied by this Court (486 U.S. 1059 (1988)). The Sixth Circuit in its August 7, 1987 opinion held that an implied right of action exists under § 13(e)(1) of the Exchange Act.

As we demonstrate herein, there is no split among the Circuit Courts of Appeal on either issue and Petitioners' request for this Court to review the decisions below should be denied.

REASONS FOR DENIAL OF THE WRIT

A. The Sixth Circuit Correctly Held That When The SEC Mandates Disclosure of Certain Facts By The Issuer In A Going Private Transaction The Failure To Disclose Such Required Facts Creates A Rebuttable Presumption That The Omitted Facts Are Material.

Petitioners Nationwide Corporation and Nationwide Mutual Insurance Company argue that the March 6, 1991 decision of the Sixth Circuit below conflicts with this Court's decision in *TSC Industries, Inc.* v. *Northway, Inc.*, 426 U.S. 438 (1978) and *Basic, Inc.* v. *Levinson*, 485 U.S. 224 (1988). (Writ, p. 7)[1]. Petitioners argue that the Sixth Circuit's "new presumption of materiality is inconsistent with the *TSC* materiality standard." (Writ, p. 11). This is a mischaracterization of the decision of the Sixth Circuit. The Sixth Circuit decision is very narrow and creates a presumption that when the SEC mandates the disclosure of certain facts, under Section 13(e) and Rule 13e-3 promulgated thereunder, if such facts are not disclosed they may be presumed as evidence that such facts are material to a reasonable investor. This is consistent with the materiality standard announced in *TSC*. The issuer must then rebut the presumption with contrary evidence. If an issuer fails to disclose the required facts or present evidence that the omitted facts are immaterial to a reasonable investor, a trial court cannot rule as a matter of law that the withheld facts are immaterial to a reasonable shareholder. Any attempt to broaden the interpretation of the decision of the Sixth Circuit below to include a new standard of materiality is simply a tortuous attempt to create a conflict where none exists.

Moreover, there can be no conflict between this decision and *TSC* for the simple reason the two cases involve different SEC rules. This case is limited to Rule 13e-3 and, therefore, cannot conflict with this Court's interpretation of Rule 10b-5.

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[1] Citations are to the Appendix attached to the Petition for Writ of Certiorari.

There is no conflict among the Circuit Courts of Appeal. The Sixth Circuit decision does not conflict with any of the decisions cited by Petitioners. In *Berg* v. *First American Bankshares, Inc.*, 796 F.2d 489 (D.C. Cir. 1986), the Circuit Court of Appeals did not address a violation of Section 13(e) or Rule 13e-3. The Circuit Court made a reference to whether an alleged violation of Section 13(e) can serve as a predicate act of racketeering activity under the Racketeer Influenced and Corrupt Organization Act, 18 U.S.C. § 1961-1968 (RICO). The Court merely restated the holding of the Sixth Circuit, that liability under Section 13(e) requires a finding of materiality. *Berg*, 796 F.2d at 502. The Sixth Circuit decision is in accord. ". . . we agree with the District Court that the general *TSC* standard of materiality is applicable to transactions governed by Rule 13e-3 . . . ." Petitioners' Appendix (3a).

The Sixth Circuit decision is also not in conflict with *United States* v. *Bilzerian*, Fed.Sec.L.Rep. (CCH) ¶ 95,701 (2d Cir. Jan. 3, 1991). The Second Circuit's opinion was from the appeal of a criminal conviction for, among others, violations of the federal securities laws. The *Bilzerian* case did not involve any question relating to Section 13(e) or Rule 13e-3. The Second Circuit in *Bilzerian* concluded that the fact that the SEC requires information to be revealed under § 13(d) "is *evidence* of its materiality" under the *TSC* test relating to Rule 10b-5. *Id.* at 98,291. The logical extension of the Second Circuit's conclusion is that in the absence of any contrary evidence, a court cannot determine as a matter of law that the omitted facts would not be material to a reasonable investor. The holding of the Second Circuit is consistent with the Sixth Circuit's decision in the case before this Court.

Likewise, *Levine* v. *NL Industries, Inc.*, 926 F.2d 199 (2d Cir. 1991), presents no conflict with the Sixth Circuit's decision. *Levine* did not address any disclosure issue relating to Section 13(e) or Rule 13e-3. In *Levine*, the plaintiff brought an action for violation of § 10(b) and Rule 10b-5 relating to

the defendant-issuer's failure to disclose potential liabilities for failure to comply with environmental regulations. There was no specific disclosure requirement promulgated by the SEC that requires an issuer to state that it was operating in violation of applicable environmental laws. The Second Circuit merely affirmed the trial court's judgment that any inference of materiality relating to the alleged non-disclosure was overcome by contrary facts. This is the same as the Sixth Circuit's conclusion that the presumed fact of materiality relating to Section 13(e) disclosures may be overcome by contrary evidence.

Petitioners have not established a conflict between the Sixth Circuit's decision below and any decision in any other Circuit.

B. The Sixth Circuit Correctly Held That An Implied Right Of Action Exists Under Section 13(e)(1) of The Exchange Act.

For the second time Petitioners also argue that the Sixth Circuit in its August 7, 1987 decision exercised faulty reasoning in finding an implied private cause of action under § 13(e) of the Exchange Act. Petitioners argue that the court below ignored the *Touche Ross & Co.* v. *Redington*, 442 U.S. 560 (1979), and *Transamerica Mortgage Advisors, Inc.* v. *Lewis*, 444 U.S. 11 (1979), decisions and expanded the *Cannon* v. *University of Chicago*, 441 U.S. 677 (1979), decision. This does not create a conflict between Circuit Courts as to the result reached by the Court below. Petitioners' initial request for review of the Sixth Circuit's decision of August 7, 1987 was denied. Petitioners simply disagree with the decision of the Sixth Circuit and have not satisfied the customary criteria for the Court to issue a discretionary writ of certiorari to review the decision below.

Likewise, Petitioners' reliance on the existence of conflicts between the decision below and selected district court deci-

sions outside of the Sixth Circuit is misplaced. Such conflicts are better left to a resolution by the appropriate Circuit Court of Appeals for the respective districts. Until such time, there is no conflict ripe for consideration by the United States Supreme Court. Just as this Court rejected Nationwide's Petition in 1987, likewise it should do the same now.

CONCLUSION

It is respectfully submitted that Petitioners have failed to sustain their burden of establishing that there are special and important reasons why a Writ of Certiorari should be granted. Neither decision below conflicts with any decision of another Circuit Court, or of this Court. Since the decisions correctly apply principles previously articulated by this Court, they do not involve any important question of federal law which has not been, but should be settled by this Court. In addition, this case is not ripe for consideration because there has been no trial and, thus, no final decision on the merits.

Petitioners have shown no reason why this Court should exercise its sound judicial discretion to entertain this case.

Respectfully submitted,

DOUGLAS G. COLE
(Counsel of Record)
William R. Jacobs
STRAUSS & TROY
2100 Central Trust Center
201 East Fifth Street
Cincinnati, Ohio 45202-4186
(513) 621-2120
Counsel for Respondents
Howing Company and
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